APPENDIX OF RELEVANT ORDERS.

JUDGMENT AND COMMITMENT—FILED NOVEMBER 21, 1966.

UNITED STATES DISTRICT COURT
for the
Middle District of Tennessee,
Nashville Division.

UNITED STATES OF AMERICA,
v.
WILLIAM J. DONOHO. } No. 13,543.

On the 21st day of November, 1966 came the attorney for the government and the defendant appeared in person and by his attorneys, John J. Hooker and Quentin L. Housholder.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a jury verdict of guilty as to each count of the five-count indictment of the offense of violating Section 7206 (1), Title 26, United States Code, as charged in five counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) months under each count of the five count indictment, said sentences to run concurrently with each other, and the defendant shall pay the sum of $500.00 with

remain under each count of the five-count indictment, making a total fine of $2500.00 with remain. It is further Ordered that the defendant shall be eligible for parole at the conclusion of service of four months of his sentence.

It Is Adjudged that execution of the sentence of imprisonment and payment of the fine be suspended for the ten days allowed by law for the filing of a notice of appeal. If filed, execution of the sentence imposed herein will be suspended pending the disposition of the said notice of appeal. The defendant will remain on his present bond for the ten day period, and if notice of appeal is filed, thereafter pending the disposition of the appeal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

FRANK GRAY, JR.,
United States District Judge.

OPINION OF THE COURT—FILED NOVEMBER 29, 1966.

The Court: Now, in this case the defendant has filed a motion for new trial and a subsequent amendment to the motion to add one additional ground.

The motion for new trial as amended consists of 22 grounds. With reference to the first 15 grounds they all allege error on the part of the Court in refusing to charge certain special requests submitted by the Defendant numbered 1 through 15. The Defendant has not argued these grounds before the Court in detail. I felt at the time that the charge given was a fair statement of the law and I still feel that it was a fair and accurate statement of the law and that the requests that were denied either did not state the law accurately or that when they did the

charge as given covered the points involved. Therefore, as to the first 15 grounds, the motion is overruled.

Now, Grounds 16, 17 and 18 pertain to alleged errors by the Court in the person of Judge Miller in the early part of this trial in permitting certain testimony of the witnesses Lula Gray, William H. Frazier and Albert Joseph Kreitner. I felt at the time that I read the transcript prior to taking over this case that Judge Miller was correct in determining that the proof which had been offered with reference to agency was adequate to make the testimony admissible. I still feel that way and, therefore, those grounds are overruled.

Now, Ground Number 19 is really an allegation that Rule 25 of the Federal Rules of Criminal Procedure is unconstitutional. This rule was promulgated by the Supreme Court of the United States this year and I must assume that having promulgated the rule that the Supreme Court of the United States considered it constitutional. I, therefore, will necessarily overrule Ground 19 of the motion for new trial.

Now, Grounds 20, 21 and 22 all must be considered in the light of the stipulation which was filed by the parties before the trial of the case began. That stipulation was somewhat broader than it has been stated today in argument by defense counsel. The actual language of the stipulation is as follows: The parties further stipulate that none of the income reported on the tax returns by the Defendant, William J. Donoho, and wife, came from law violators in the form of protection payments and the tax returns do not reflect receipt of any such income by the Defendant. That is the end of the quotation.

This encompasses two stipulations. Secondly, that the tax returns didn't list receipts of protection payments but more importantly the first part of it that the income records on the tax returns didn't include any such pay-

ments no matter how it may have been listed on such tax returns.

That stipulation changed the case materially, changed the issues of the case materially, from the issues that they would have been without the stipulation. The charge was the signing of a return that the Defendant did not believe to be true as to every material fact.

With this stipulation that no bribe income was included in the amounts as well as not being listed thereon as bribe income, the case actually became—the issues in the case actually became an issue as to whether or not the Defendant had in the years in question received bribes.

Now, that applies first to Ground Number 22 of the amended motion for new trial which says that the Court was in error in permitting the witnesses Nichols and Cox to testify that they paid bribes to the Defendant in years prior to the indictment years.

The charge is made in this motion that the charge involved in this case is not receiving bribes but for falsely swearing to an income tax return. It is certainly true that the charge originally was that, but upon the filing of the stipulation the charge actually became receiving bribes and I think that the testimony of the witnesses Nichols and Cox was admissible under the pattern decisions with which I'm sure all counsel are familiar in bribery cases.

Now I come to Number 20 and 21. Number 20 is an allegation there was an error in holding that the Defendant was not entitled to argue before the jury that the Government had withdrawn its position originally taken in various Bills of Particulars that a deficiency in Defendant's income taxes for the years 1960 and 1961 would be sustained by expenditures and disbursements method.

Actually, I think that the stipulation completely eliminated that matter from the lawsuit and that any argu-

ment—if I had permitted argument I would have been in error.

Now, on Number 21 which is stated by the Defendant to be the principal ground of all these grounds and that is that I was in error in refusing permission to the Defendant to introduce certain net worth testimony which he desired to do, I think that the argument made by defense counsel on its face has a great deal of plausibility. It is a question that has given me considerable concern because it is a plausible argument, but upon analysis I think that it appears that the plausibility is merely on its face and is not real.

Let me analyze for a moment just what defense testimony of net worth would have included and what the issue would have been.

First the fact that a certified public accountant prepares a bunch of figures means nothing. It merely means that somebody who is accurate with his figures can take figures that are shown to him or records that are shown to him and prepare statements. It would have no probative value as to the correctness of it because the correctness of those figures would depend entirely on two factors: The accuracy of the figures furnished and the accuracy of the mathematical computations made by the certified public accountant.

Let us assume that the mathematical computations would be correct, then we get back to the fundamental accuracy of the figures furnished.

Let us assume that in connection with most of those figures their accuracy could be clearly established and I think that that is true. There could be established, for example, how much a Defendant paid for an automobile. It could be established what real estate he owned, what the property taxes were. There are many things that

could have been established accurately and would have been accurately reflected on these schedules to be submitted by the certified public accountant.

We really get down, however to one matter and that would be the Defendant's statement that he didn't spend any money other than what he told the public accountant for living expenses, that he didn't have any other disbursements of any kind and that he didn't have any money in his pocket or anywhere else that would account for any extra income.

I think that from a probative value alone that it would have had no probative value and I think that on that basis alone it could be properly excluded.

I think we go a little further there and consider it in the context of the stipulation which was filed that the defendant had not included any bribe income in his tax returns either under that label or any other way and that that would make this other testimony entirely irrelevant to the issue that was before the jury and although it was a tax evasion case that issue had boiled down as the result of the stipulation to a simple issue of receipt or non-receipt of bribes during the taxable years and for that reason I feel that this proposed testimony was properly excluded and, therefore, the motion for new trial is overruled.

The court reporter will transcribe these oral remarks and they will constitute the order of the Court in overruling the motion for new trial. Now, let the Defendant be brought before the bar for sentencing.

Reporter's Certificate.

I, John E. Hamlin, official court reporter for the United States District Court, Middle District of Tennessee, with office at Nashville, hereby certify that I recorded on the

Stenograph Shorthand Machine the opinion of the Court given from the bench on Monday, November 21, 1966, in the matter of: United States of America vs. William J. Donoho, Nashville Criminal Case No. 13,543; and that the foregoing is a true and correct transcript of the same.

This the 29th day of November, 1966.

John E. Hamlin,
Official Court Reporter.

OPINION.

No. 17,671.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM J. DONOHO, Defendant-Appellant.	Appeal from United States District Court for the Middle District of Tennessee, Nashville, Division.

Decided January 24, 1968.

Before Weick, Chief Judge, Edwards, Circuit Judge, and Cecil, Senior Circuit Judge.

Weick, Chief Judge. Appellant was convicted by a jury on all five counts of an indictment charging him with wilfully subscribing to false income tax returns for the calendar years 1957, 1958, 1960, 1961 and 1962, in violation of 28 U. S. C., § 7206 (1). He was sentenced to fifteen

months' imprisonment on each count, to run concurrently, and to a fine of five hundred dollars on each count.

Appellant had been previously tried for the same offenses, but that trial resulted in a mistrial.

Donoho was a high-ranking officer on the Nashville police force. The Government proved its case by the specific item method. It offered evidence tending to prove that payoffs were made by law violators to Donoho, for police protection, during the indictment years. It was stipulated that none of the income reported in his tax returns was derived from such sources and his returns do not reflect the receipt of any such income. The law violators were engaged in the operation of houses of prostitution, professional gambling, and the illegal sale of intoxicating beverages.

Donoho took the witness stand and denied that he had ever taken payoffs or protection money. He then offered to introduce in evidence a computation of his net worth and expenditures for the years 1960 and 1961, and evidence to support these figures, but the Court refused to admit them into evidence. This is the principal error relied upon in the appeal.

Had this occurrence taken place at the first trial, we think there might have been some substance to the contention. The Government had filed bills of particular stating that its method of proof would be by specific items of income not reported on Donoho's income tax returns for the years in question, and by the expenditures method for the years 1960 and 1961. Since the Government then planned to use the expenditures method, it might have been competent for Donoho to offer his net worth computation as part of his defense to counts 3 and 4. **United States v. Moody**, 339 F. 2d 161 (6th Cir. 1964).

After the first trial, however, the posture of the case changed. A stipulation was entered into as follows:

"The parties hereby stipulate that the attached Exhibits 'A', 'B', 'C', 'D', and 'E' are accurate copies of income tax returns filed by William J. Donoho and wife for the years 1957, 1958, 1960, 1961 and 1962, respectively and that the attached Exhibit 'F' is a Certificate of Assessments and Payments for the same years accurately reflecting the tax assessed to and paid by William J. Donoho and wife. The taxpayers reported Adjusted Gross Income on their tax returns for these years, as follows:

1957	$10,557.98
1958	11,295.31
1960	18,434.08
1961	18,962.94
1962	20,262.44

"The parties further stipulate that none of the income reported on these tax returns by the defendant William J. Donoho and wife came from law violators in the form of protection payments and the tax returns do not reflect receipt of any such income by the defendant."

The Government filed an amended bill of particulars, stating that its method of proof would be by specific items of income on all of the counts of the indictment.

It will be observed that the parties stipulated that the Certificate of Assessments and Payments "accurately" reflected the tax assessed to and paid by Donoho for the years in question and that none of the income reported on his tax returns "came from law violators in the form of protection payments and the tax returns do not reflect receipt of any such income by the defendant."

The stipulation thus narrowed the issues and left it to the jury to decide whether to believe the testimony of the law violators that they paid substantial sums to Donoho

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The stipulation thus narrowed the issues and left it to the jury to decide whether to believe the testimony of the law violators that they paid substantial sums to Donoho

for police protection, which sums admittedly were not reported in the tax returns, or to believe Donoho's denials. By its verdict it is apparent that the jury credited the testimony of the law violators and disbelieved the testimony of Donoho.

To have permitted Donoho to offer net worth computations for the two years in question, would have been inconsistent with the stipulation that his returns accurately reflected the tax assessed by and paid by him, except for protection money. At most, it would constitute an attempt by Donoho to corroborate his denials by his own self-serving testimony regarding his assets and expenditures. It would introduce extraneous matters in evidence and might confuse the jury.

Donoho relies on **Moody**, but this case did not involve a stipulation as to the accuracy of the tax assessments and payments. In **Moody** the Government did not prove its case by specific items, but by a bank deposits computation. In our case no tax would be owing unless the jury found that the defendant received and accepted the graft money.

Donoho further contends that the court erred in not permitting his counsel to comment in his argument to the jury on the Government's changing its bill of particulars from expenditures method of computation to specific items in connection with two counts of the indictment. His theory is that the jury would be entitled to draw an unfavorable inference against the Government for "failure to produce a witness whose testimony would shed light on a particular transaction." The trouble with this contention is that the Government did not withhold any evidence. It merely changed its method of proof to conform to the stipulation. Furthermore, the Government would have difficulty in proving defendant's expenditures without his cooperation.

Finally, appellant contends it was error to admit the testimony of Albert "Mickey" Kreitner, a law violator, that he made protection payments to Sergeant Morgan Smith of the Nashville police force, in the amount of six hundred dollars, in 1957 and 1958, and that Smith told him [Kreitner] that Donoho would receive one-half of the money. It is appellant's position that this was hearsay evidence.

There was testimony of Lula Gray, the owner of a Nashville house of prostitution, that she paid Donoho one hundred fifty dollars per month, beginning in August, 1957, and continuing through August, 1958, to prevent the police from raiding her place, and that some of the payments were made personally to Donoho and some were collected for Donoho by Sergeant Smith. William Frazier, a numbers operator, testified that he paid Donoho one hundred dollars per month during the years 1957, 1958, 1959, 1960 and 1961, and that Smith on occasions would pick up these payments for Donoho, including one hundred dollars for himself. We think the testimony of Gray and Frazier was sufficient to justify the District Judge's ruling that Kreitner's testimony was admissible on the ground of vicarious responsibility.

The Government contends that we should affirm in any event, since the errors charged do not relate to all of the counts of the indictment and the prison sentences imposed were concurrent. **Hirabayshi v. United States**, 320 U. S. 81 (1943); **United States v. Jett**, 352 F. 2d 179 (6th Cir. 1965). The fines imposed, however, were cumulative. Since we have found no prejudicial error in the conviction, it is unnecessary for us to rule on this point.

Affirmed.